UNITED STATES
v.
HEIRS OF JAKE YAQUAM

IBLA 94-704 Decided July 30, 1997

Appeal from a decision of Administrative Law Judge Ramon M. Child, approving a Native allotment application and directing issuance of a Native allotment certificate. A-01787.

Affirmed.

1. Alaska: Native Allotments

Under the Native Allotment Act of 1906 and implementing regulations, an allotment applicant must show substantially continuous use and occupancy, potentially exclusive of others, for a period of 5 years.

2. Alaska: Native Allotments

Use of the land which does not leave physical evidence of use is sufficient to establish entitlement to an Alaska Native allotment where the record demonstrates substantiality and exclusivity of use by a preponderance of the evidence. Where a witness for the applicant testifies and attests to the applicant's regular use of the land in question for subsistence hunting, fishing, berry picking, and other activities which do not always alter the appearance of the land, the requirement of substantial use may be satisfied. In considering whether the use was exclusive of others, the Native customs and mode of living may be taken into consideration. A showing that the applicant had posted the land and that he had affirmatively declared the area as his allotment is sufficient, in the absence of contrary reliable evidence, to preponderate on the issue of exclusivity.

3. Evidence: Generally--Evidence: Sufficiency--Evidence: Weight--Rules of Practice: Evidence

The Board has full authority to reverse findings of fact made by an Administrative Law Judge. However, when the resolution of disputed facts is clearly premised upon a Judge's findings of credibility, which

> are in turn based upon the Judge's reaction to the demeanor of the witnesses, and such findings are supported by substantial evidence, they ordinarily will not be disturbed by the Board.

APPEARANCES: Roger L. Hudson, Esq., Office of the Regional Solicitor, Anchorage, Alaska, for the Bureau of Land Management; Maria C. Lisowski, Esq., Office of the General Counsel, U.S. Department of Agriculture, for the Forest Service; Marlyn J. Twitchell, Esq., Alaska Legal Services Corporation, Anchorage, Alaska, for the heirs of Jake Yaquam.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

On June 10, 1994, Administrative Law Judge Ramon M. Child issued a Decision approving Native allotment application A-01787 and directing issuance of a Native allotment certificate. The Bureau of Land Management (BLM) has appealed. 1/

On April 19, 1915, Jake Yaquam, a Tlingit Indian, filed, pursuant to the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970), an application for a Native allotment of 160 acres of land described in the application as being in an area known as "Ground hog bay." (Ex. G-6.) 2/ In an affidavit accompanying the application, Yaquam and two others attested that Yaquam had occupied the land since "boyhood." Id. at 2. The claim was later adjusted and the land identified as the NW¼ of sec. 13 and the SE¼ NE¼ of sec. 14, T. 42 S., R. 62 E., Copper River Meridian, Alaska, approximately 11 miles northeast across Icy Strait from the village of Hoonah. (Ex. G-Supplemental 2; Ex. G-Supplemental 4.) The claimed land is within the Tongass National Forest.

On March 17, 1917, General Land Office (GLO) Mineral Surveyor George Parks conducted a field examination of the tract and thereafter prepared a report dated May 4, 1917. (Ex. G-10.) Prior to preparation of his report,

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1/ The U.S. Department of Agriculture, Forest Service, also filed a timely notice of appeal. Counsel for the Forest Service filed a motion to adopt the reasons for appeal filed by BLM in this case. That motion is granted.

2/ The Act of May 17, 1906, as amended by the Act of Aug. 2, 1956, 48 U.S.C. § 357 (1958), was repealed by § 18(a) of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1617(a) (1994), effective Dec. 18, 1971, subject to applications pending on that date. The Act of May 17, 1906, authorized the Secretary of the Interior to allot "in his discretion and under such rules as he may prescribe" up to 160 acres of vacant, unappropriated, and unreserved nonmineral land upon satisfactory proof of "substantially continuous use and occupancy of the land for a period of five years." 43 U.S.C. §§ 270-1 and 270-2 (1970).

he also interviewed Yaquam. Because Yaquam spoke no English, Parks' interview, which consisted of a number of questions and answers, was conducted with the assistance of an interpreter, Annie Willard, and was memorialized as an undated typewritten document, designated herein as Government exhibit G-8. See Tr. 40-46.

In his report, Parks stated that upon arriving at Ground Hog Bay on the date of his field examination, "we found about a dozen Indians camped on the beach. They had come from Juneau at our request to show us just what land they claimed." (Ex. G-10, at 2.) Parks does not identify who those individuals were or whether Yaquam was one of them. However, the only allotment discussed in the report is that of Yaquam.

During his field examination, Parks found a pile of lumber on the beach "with which one Charlie Moses intended to build a house under permission of Yaqua[m]." Id. "There are no evidences of recent occupation. In fact, Yaqua[m] does not claim to have lived on the land at any time during the past 60 years. (See Statement [Ex. G-8])." Id. at 3. 3/ However, he did find evidence of earlier Native occupation such as graves and logs "which they say are totems." Id. Parks also found a small house which he described as being the property of Robert Greenwald who built it in 1913. He stated that Greenwald filed a homestead location notice in 1916, alleging settlement of 160 acres at Ground Hog Bay in 1912. Parks stated: "The intent of the allotment [Act] is to furnish a home for each native, and not to permit the acquisition of village sites. If this land, as is claimed by Yaqua[m], is an old village site then he has no more right to it than any other member of the tribe." Id. at 6. Parks further stated:

> Greenwald has a family, and has expended nearly $2000.00 in labor and money on his place. He should be given every consideration. At the same time, the rights and traditions of the natives should not be ignored and if they want a village site on this ground it should be reserved for them as a tribe but should not be allotted to any individual native. The Hoonah natives now have a large and thriving village at Hoonah and it is extremely unlikely that they will ever leave. In the four years since Yaqua[m] first put his stakes on this allotment he has never

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3/ During the interview, Parks asked Yaquam the following:

"Q. How old are you?

A. I think I am over sixty years old.

Q. Have you ever lived on this land upon which you have filed your allotment?

A. I think it is about six years I have not been on the ground, but that is an old village of my people."

(Ex. G-8, at 1.) Above the typewritten word "six" are inserted the handprinted letters "ty." There is no indication who inserted those letters, although it clearly would not have been Yaquam because he signed his Native allotment application with an "X." See Tr. 41-43.

> visited the land until he went over this year at our request. He has given permission to Charlie Moses to build a house there but if Moses wants a place to build a house he can take an allotment of his own. Certainly if past performances are to be considered as an indication of future action the natives will never do one single thing toward cultivating any land for themselves.

Id. at 8.

Parks stated that Yaquam "lives in Auk Village and has no intention of going there [the land claimed in the allotment application]." Id. at 9-10. 4/ He recommended that the Yaquam application be denied.

The record contains the April 3, 1917, affidavit of Robert Greenwald. (Ex. G-9.) Greenwald states therein that he first went to the land in October 1912 and built a small house in which he, his family, and a Mr. Douglas lived. In early 1913, he began building a log house about a quarter of a mile from the first house. In March 1913, he and his family left the land but returned in the fall, living in the log house through the spring of 1914. He and his family lived in the log house intermittently thereafter and then continuously, from fall 1916 through the time of the affidavit. Greenwald claimed that he had no notice of use of the land by others until 1914 when "about twenty natives came over from Hoonah and put up some stakes and a notice" and had "a big celebration and war dance." Id. at 1. In the fall of 1916, Natives "brought a load of lumber to the land and started to build a house on the point where they claim is the site of an old village." Id.

Greenwald filed his homestead notice on October 17, 1916, claiming settlement and improvements from October 1912, "and occupancy of same each and every year since that date." (Ex. G-11, at 3.) According to the record of Yaquam's interview, Yaquam stated that he told Greenwald that "the ground belongs to me and you cannot keep it;" that Greenwald moved out of his cabin; and that Greenwald offered to sell it to Yaquam for $70. (Ex. G-8, at 5.) Yaquam further stated that all this took place "[s]ometime during the Spring before I staked my allotment and made application in the land office." Id.

On August 15, 1917, the GLO Commissioner issued a decision entitled "Holding Allotment for Rejection." (Ex. G-10b.) Yaquam received notice of the rejection on November 5, 1917, when Willard signed the return receipt. (Ex. G-11a.) No appeal was filed, and the GLO Assistant Commissioner issued a decision on February 8, 1918, finally rejecting the application. (Ex. G-11a.) Jake Yaquam died on December 31, 1918. 5/

4/ During the interview, Parks asked Yaquam whether he "ever intended to live over there [Ground Hog Bay]?" Yaquam responded: "Yes I intend to live there. That is the reason I ask for it." (Ex. G-8, at 4.)

5/ The date of Yaquam's birth is unknown and his age at his death was a matter of speculation at the hearing. See Tr. 109-10, 123.

On July 10, 1980, BLM reinstated Yaquam's Native allotment application. 6/ On February 1, 1989, BLM initiated a contest of Yaquam's allotment application. On September 3, 1991, Administrative Law Judge Ramon M. Child conducted a hearing in Juneau, Alaska.

Following completion of the hearing in this case, Judge Child, on September 27, 1991, issued an order leaving the record open in the case until BLM had resolved a conflict between the Yaquam allotment application and the Native allotment application of Harry Marvin, AA-6633. On September 17, 1993, BLM filed three documents evidencing resolution of that conflict, as well as a copy of a Supplemental Native Allotment Field Report, dated August 23, 1993 (1993 Field Report), prepared by a BLM Realty Specialist following a July 12, 1993, field examination of the land. By order dated October 15, 1993, Judge Child accepted those four documents as part of the record in the case, designating them as exhibits G-Supplemental 1, 2, 3, and 4, respectively.

Yaquam's only surviving heir, his daughter, Cecilia Kunz, was 81 years old at the time of the hearing. She testified that when she was a small child she went with her family from Sitka or Juneau to "that place" in a gas boat. (Tr. 113-16.) They would go in the summer, stay in a cabin built of boards, and use the land every year from the time she could remember until her father died in 1918. (Tr. 116, 122, 126, 131-32, 140.) On cross-examination, she stated that she took it for granted that her father had built the cabin. (Tr. 136.) There was a river or stream on the land which passed near the cabin. (Tr. 134.) She stated that the family lived off the "fat of the land" catching fish, crabs, clams, and gathering berries, and growing tomatoes, rutabagas, turnips, and carrots. In addition to the cabin, there was also a smokehouse and an outhouse. (Tr. 118-19, 123.) 7/ Asked if she saw other people on the land, she testified that "no white man came by that place" nor did any other people use it, and she could not remember whether there was a house or cabin built by a homesteader. (Tr. 125-26.)

6/ The BLM is required by § 905(a) of Alaska National Interest Conservation Act, 43 U.S.C. § 1634(a) (1994), to reinstate, for purposes of either legislative approval or adjudication, any Native allotment application that was rejected by the Department without an opportunity for a hearing on a disputed question of fact, as required in 1976 by the Federal appeals court in Pence v. Kleppe, 529 F.2d 135, 142-43 (9th Cir. 1976). See S. Rep. No. 413, 96th Cong., 1st Sess. 238 (1979), reprinted in 1980 U.S.C.C.A.N. 5070, 5182; Ellen Frank, 124 IBLA 349, 351-52 (1992). This is so even if an applicant was notified of an earlier rejection and no appeal was taken, since lack of compliance with Pence vitiates the administrative finality that would otherwise attend the rejection. Heirs of George Titus, 124 IBLA 1, 4 (1992).

7/ Kunz also submitted an affidavit, dated Aug. 11, 1989, describing her family's activities on the land. (Ex. G-12.)

Kunz further testified that her father also fished and sold the catch to canneries in the summers. (Tr. 128.) She knew Annie Willard, testifying that Willard "went with my Dad * * * to apply for that land," and that Willard spoke both languages (Tlingit and English). (Tr. 132-33.) She knew Charlie Moses but Moses did not come on the land when she was there with her family. (Tr. 136.) After her father died the boat was sold and she did not return. (Tr. 143.)

In the 1993 Field Report, the BLM Realty Specialist stated that he was accompanied on his field examination by four others: Kunz, a tribal realty specialist, a Forest Service archaeologist, and a Forest Service ranger. He related that Kunz told him that her father had been chief of the Kagwantan Tribe (the Wolf Tribe); that her father had selected the land for himself and his family; that her father was recognized as the owner of the land; that no other Native came on or used the land without his approval; and that people of her father's tribe would ask her father for permission to hold ceremonies and celebrations on the land. (Ex. G-Supplemental 4, at 3.)

The BLM Realty Specialist stated that Kunz recalled gathering berries on the parcel, harvesting seaweed, crabs, and shellfish and fishing with her father. He acknowledged that "[t]here was an abundance of natural resources to support the applicant's claimed use." Id. at 4. Summarizing Kunz's personal knowledge of the parcel, he stated:

> Although Ms. Kunz seemed to have difficulty in remembering specific details, she readily described the route taken by boat to the parcel. She was familiar with the landmarks and the general geography of the parcel. At the parcel Ms. Kunz recounted her memories of the activities which were described earlier in this report and pointed out the areas where these activities occurred. Ms. Kunz expressed regret that it has taken this many years to resolve this matter, since it is hard to remember details from so long ago.
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> Ms. Kunz provided a great amount of information in support of her father's claim. She was knowledgeable about the site in general, the local geography, and her father's legacy as the last chief of the Kagwantan Tribe. She was also knowledgeable of the resources present on the land and told of her family subsisting on what the land provided. She recounted experiences as a child spent with her father and her family while at the parcel. However, because of her age at the time, she was unable to provide much specific information of her father's use and occupancy.

Id. at 4.

The BLM Realty Specialist concluded in the 1993 Field Report that the credibility of Kunz, the absence of information contrary to the applicant's claim, the presence of claimed resources, "[i]ndependent corroboration of

evidence of control of the land found in the casefile (see report dated 8/15/1917)," and the availability of the land during the claimed time period, all supported Yaquam's claim to the "area, as described in the conflict resolution." Id. at 5.

In his Decision, Judge Child identified two issues for resolution: (1) Whether Yaquam substantially used and occupied the land for a period of 5 years, and (2) if so, whether his use was at least potentially exclusive of others.

As to the first issue, Judge Child found that Kunz's testimony and the 1993 Field Report established Yaquam's substantial use and occupancy. With respect to the second issue, Judge Child found that both the Natives and Greenwald acknowledged and deferred to what they recognized as Yaquam's superior right to the land. He concluded, therefore, that Yaquam's use and occupancy was at least potentially exclusive of others. Accordingly, the Judge held that Yaquam was entitled to the allotment.

Counsel for BLM contends that the evidence does not support the conclusion that Yaquam occupied the land for the requisite 5-year period. He asserts that the report of Yaquam's interview, (Ex. G-8), is entitled to the presumption of regularity and that the Judge should have accorded it greater evidentiary weight.

Next, counsel argues that the Judge erred in according greater credibility to the testimony of Kunz, than "official government records." (Statement of Reasons (SOR) at 10.) He admits that Kunz's testimony indicates that her father took the family "someplace each summer for at least a few years before he died in 1918." (SOR at 12.) Counsel speculates, however, that the site which Yaquam "actually used and occupied each summer in the company of his family may have been somewhere else in the general vicinity." Id. He asserts that BLM's own 1993 Field Report is vague as to the location of the allotment and "adds practically nothing, since it is based almost entirely on Ms. Kunz's statements." Id. at 14 n.5.

Counsel further argues that exclusivity of use is not demonstrated by the record. He claims that more credibility should be accorded the contemporaneous GLO records than the Kunz testimony and the 1993 Field Report. Counsel contends that the Judge selectively utilized the Yaquam interview in that he accorded little credibility to Yaquam's statement therein that he had not been on the land in 60 years, but relied on it to show that Greenwald left the land at Yaquam's behest. While counsel recognizes that Greenwald's claim was filed later than Yaquam's, he asserts that Parks' report "contains no suggestion that Greenwald has abandoned the land on which he had built two houses." (SOR at 20.)

[1] Counsel for the heirs of Yaquam contends that Judge Child applied the wrong law in granting the Yaquam allotment. She asserts that the proper law to apply is the law existing at the time the application was filed and rejected, and that it is improper to apply the 5-year use and

occupancy requirement, because it was inserted in the Allotment Act by amendment in 1956. However, counsel does not specifically state what the existing law was in 1917.

Under the Allotment Act, the granting of an allotment was discretionary with the Secretary of the Interior and much of the development of a program for allotment to Alaska's Natives was left to the Secretary. See Solicitor's Opinion M-36662, 71 Interior Dec. 340, 354 (1964). In 1917, the Secretary felt that such factors as "the special value of the tract, either for agricultural uses or fishing grounds," the type of residence, if any, maintained on the tract by the applicant, "the value and character of all improvements," the fitness of the land as a permanent home for the allottee, "the competency of the applicant to manage his own affairs," and the presence or absence of any adverse claims were relevant to whether or not a Native should receive an allotment. GLO Circular No. 491, Instructions Relating to the Acquisition of Title to Public Lands in the Territory of Alaska, dated July 19, 1916, 45 Pub. Lands. Dec. 227, 246 (1917). It is not clear that application of such factors to Yaquam's application would benefit the heirs of Yaquam.

The applicable standard of proof in Native allotment adjudications is the product of legislative and administrative evolution. Thus, the amendment of the Allotment Act in 1956 merely made mandatory under the statute the determination of use and occupancy that had been applied by the Secretary in his discretion prior to the amendment. When BLM reinstated Yaquam's allotment application in 1980, it did so to insure that the application would be adjudicated with the Pence protections. We find that Judge Child applied the proper statutory and regulatory requirements in reaching his Decision.

[2, 3] In a Government contest of a Native allotment application, the contestant bears the burden of presenting sufficient evidence to establish a prima facie case of ineligibility and the Native applicant bears the burden of proof by a preponderance of the evidence should a prima facie case be established. United States v. Heirs of David F. Berry, 127 IBLA 196, 205 (1993); United States v. Estabrook, 94 IBLA 38, 45, 51-53 (1986). The Department has consistently ruled that, in order to establish entitlement under the 1906 Act, the applicant must affirmatively show that he or she has met the requirements of the Act and its implementing regulations. United States v. Galbraith, 134 IBLA 75, 100-101 (1995), and cases there cited. Substantially continuous use and occupancy of the claimed land for a minimum of 5 years is required. Such use and occupancy contemplates substantial actual possession and use of the land, at least potentially exclusive of others. United States v. Rastopsoff, 124 IBLA 294 (1992). Departmental regulation 43 C.F.R. § 2561.05(a) defines the phrase "substantially continuous use and occupancy" as follows:

> The term "substantially continuous use and occupancy" contemplates the customary seasonality of use and occupancy by the applicant of any land used by him for his livelihood and well-being and that of his family. Such use and occupancy must

be substantial actual possession and use of the land, at least potentially exclusive of others, and not merely intermittent use.

To establish such use and occupancy, an applicant need not have barred the use of his land by others. Rather, his use must be shown to have been potentially exclusive of others, meaning that his use has (or should have) resulted in a public awareness and acknowledgement of his superior right to the land, even in circumstances where others used it. United States v. Heirs of David F. Berry, supra, at 209; United States v. Estabrook, supra, at 53. Generally, when a use is merely intermittent, it will not be potentially exclusive of others.

Although there are conflicts and uncertainties in the evidence in this case, we agree with Judge Child that the preponderance of that evidence supports granting the allotment. While the location of the land about which Kunz testified at the hearing is not readily determined from the transcript of the hearing, it was established by BLM's 1993 field examination. The 1993 Field Report of that examination concludes that the information presented supported a claim for the land as described in the conflict resolution. While it is true, as BLM suggests, that testimony of a witness testifying to events which occurred many years ago, during the witness' childhood, might be regarded with some skepticism, it is also true that Kunz's recollections as to her family's activities on the allotment site are not disputed, let alone refuted by contrary reliable evidence. Moreover, with regard to her credibility, and the reliability of her testimony, we defer to the evaluation of the Administrative Law Judge. As this Board has noted, where the resolution of disputed facts is influenced by a Judge's findings of credibility, which are in turn based upon the Judge's reaction to the demeanor of the witnesses, and such findings are supported by substantial evidence, they ordinarily will not be disturbed by the Board. The basis for this deference is the fact that the Judge who presides over a hearing has the opportunity to observe the witnesses and is in the best position to judge the weight to be given to their testimony, when that testimony conflicts with other evidence. United States v. Higgins, 134 IBLA 307, 316 (1996), and cases cited therein.

In considering whether the use was exclusive of others, the Native customs and mode of living may be taken into consideration. Yaquam's posting of the land and his daughter's testimony that her father had affirmatively declared the area as his allotment are sufficient, in the absence of contrary evidence, to preponderate on the issue of exclusivity. See United States v. Heirs of David F. Berry, supra, at 209-10.

In this case, the Government's case is based completely on historical documentary evidence from the case record, the Greenwald affidavit, (Ex. G-9), the Parks report, (Ex. G-10), and the Parks/Yaquam interview, (Ex. G-8). The BLM asserts that these documents, prepared by "responsible

officials," are entitled to a "presumption of regularity." (SOR at 3.) We disagree. Judge Child quite properly accorded those documents little weight. 8/

The document memorializing the Parks/Yaquam interview has many deficiencies. It is undated. It has handwritten interlineations that do not identify the author. And it bears no signatures. Moreover, as pointed out by counsel for the heirs:

> Even if there were no question as the accuracy of the transcript, it is likely that Ms. Willard's interpretation did not and could not accurately convey concepts that were foreign to Tlingit society and vice versa. See generally, UNIVERSITY OF ALASKA, ALASKA JUSTICE FORUM, Legal Interpreting in Alaska (Winter 1994) (attached). As Ms. Kunz explained, "in those days Indians, sometimes they can't express what you want to know. Like when they're writing a book about Indians, they write it down wrong, see, because the, the Indian can't express what he is trying to say." TR at 133-34.

(Answer at 15-16 n.16.)

Park's report is lacking because it is based, in large part, on the interview with Yaquam. The Greenwald affidavit shows use of the land by Greenwald prior to 1916 but it does not establish any right to the land because Greenwald did not file his application for a homestead until October of 1916 at which time he was aware of Yaquam's prior filed allotment application.

The BLM's reinstatement of Yaquam's application effectively vacated GLO's rejection of the application and restored the application to a pending status. The ensuing proceeding, brought for the purpose of resolving questions of use and occupancy, resulted in the production of new evidence and raised questions concerning the evidentiary validity of the three documents relied on by BLM. In this case, BLM's own evidence, specifically its 1993 Field Report establishes, through Kunz's statements, that Yaquam exercised dominion over the parcel and that others came onto it at his sufferance. The Greenwald affidavit, which indicates a pattern of use and occupation by Greenwald and speaks of contemporaneous use by Natives, is not amplified by new evidence, as is the Yaquam use and occupancy of the parcel. Accordingly, the unrefuted Kunz testimony, as well as BLM's 1993 Field Report, constitute evidence which far outweighs any contrary information in the 1917 documents.

8/ Judge Child properly accorded "greater weight and credibility" to Yaquam's sworn and signed affidavit, (Ex. G-6, at 2), in which Yaquam stated that he had occupied the land since boyhood than to the Parks/Yaquam interview, (Ex. G-8). (Decision at 5.)

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is affirmed.

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Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

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Gail M. Frazier
Administrative Judge